No. 80-860

In The

Supreme Court of the United States

October Term, 1980

OUIMET CORPORATION, OUIMET STAY & LEATHER COMPANY, OUIMET WELTING COMPANY, EMIL R. OUIMET WAREHAM TRUST, AVON SOLE COMPANY, TENN-ERO CORPORATION and HERBERT KAHN, *Trustee,*
Petitioners,

vs.

PENSION BENEFIT GUARANTY CORPORATION and UNITED RUBBER, CORK, LINOLEUM and PLASTIC WORKERS OF AMERICA, SOLOMON REDDIX and ALEX WILLIAMS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION FOR URW, REDDIX AND WILLIAMS

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QUESTIONS PRESENTED

1. Whether 29 U.S.C. §1301(b) makes all trades or businesses under common control a single employer for purposes of Title IV of the Employee Retirement Income Security Act of 1974?

2. Whether the Pension Benefit Guaranty Corporation abused its discretion under 29 U.S.C. §1304(f)(4) in refusing to consider a liability waiver request made after May 30, 1975?

3. Whether controlled group liability for the value of guaranteed pension benefits under 29 U.S.C. §1362, in Title IV of the Employee Retirement Income Security Act of 1974, violates the Fifth Amendment to the United States Constitution?

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RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF IN OPPOSITION FOR URW, REDDIX AND WILLIAMS

STATEMENT OF THE CASE

For the sake of brevity, Respondents United Rubber, Cork, Linoleum and Plastic Workers of America (herein called "URW"), Reddix and Williams adopt the statement of Respondent Pension Benefit Guaranty Corporation (herein called "PBGC"). The facts are also detailed in the opinion of the Court of Appeals for the First Circuit (Pet. App. 1a-20a).

In 1959, Avon Sole Company and two unions representing its hourly employees instituted a pension plan by collective bargaining agreement and this plan was continued in effect by succeeding agreements.

After 1968, URW represented the production employees of Avon. Reddix and Williams are retired employees who earned vested rights to pensions under the plan and who presently receive monthly bene-

fits from PBGC as trustee for the plan, in amounts guaranteed by ERISA.

In February 1975, after enactment of ERISA and Title IV's effective date of September 2, 1974, URW and Avon entered into a supplemental collective bargaining agreement that renewed and revised the pension plan agreement, extending its term to July 1, 1975, unless renegotiated. Avon notified PBGC that the plan would be terminated on March 25, 1975 and PBGC agreed to the date.

On the termination date guaranteed vested benefits were underfunded by $552,339.64. The plan's assets would have paid only about 40% of its guaranteed benefit liabilities. Without the PBGC guaranty, average monthly pension benefits to former Avon employees or their beneficiaries would fall from $85.00 to $35.00. If there were no

guaranty, Reddix would lose 74.3% of his present monthly benefits and for Williams the loss would be total.

Avon and its wholly-owned subsidiary Tenn-ERO, both affiliates of the Ouimet Group, were ajudicated bankrupts on March 22, 1976.

ARGUMENT

Title IV of ERISA enacted a program for insuring unfunded vested benefits on plan termination; established the Pension Benefit Guaranty Corporation (PBGC) to administer the program; provided for its financing through employer contributions; and required employers to reimburse PBGC for the cost of unfunded guaranteed benefits in an amount not to exceed 30% of their net worth. 29 U.S.C. §§1321, 1322, 1362.

In the definitions section of Title IV, Congress took over from the Internal Revenue Code the controlled group concept, treating all business under common control as a "single employer." 29 U.S.C. §1301. This concept was expressly incorporated into 29 U.S.C. §1301(b), "for purposes of [Title IV of ERISA], under regulations prescribed by the [PBGC]."

On an interlocutory appeal heard under 28 U.S.C. §1292(b) the court of appeals affirmed the ruling of the district court that Ouimet, Trust, Stay, Welting and Avon/Tenn-ERO constituted a group under common control for purposes of Title IV of ERISA and, particularly, the section dealing with employer liability on plan termination, 29 U.S.C. §1362(b).

Petitioners do not dispute that the Ouimet Group consists of trade or businesses under common control as defined in temporary Treasury regulations promulgated under 26 U.S.C. §141(c). Temp. Treas. Reg. §11.414(c). These regulations were incorporated into PBGC's own regulation on the subject. 29 C.F.R. §2612.1-3.

Petitioners contend that the statutory provision which defines as a "single employer" all trades or businesses under

common control does not mean what it says. They argue that the provision lays down no definition but merely a special rule, that the reading of the court of appeals runs counter to the language of the statute and its legislative history, and that it imposes liability on bankrupt corporations contrary to the 30% net worth limitation in 29 U.S.C. §1362(b).

None of these arguments raises any question meriting review by this Court. The statutory provision does define the term "employer" for purposes of Title IV. As stated in the Conference Report on the bill that became ERISA, Congress intended that termination liability should apply to the entire controlled group. H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. 376, 380, (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 5038, 5159. This means that the 30% net worth limit is

calculated on the basis of the net assets of the whole group, rather than any single one of its affiliates.

Congress enacted §1301(b) to prevent employers from using corporate compartmentalization to avoid termination liability. Such liability serves the declared policies of Title IV's termination insurance program by encouraging the continuance and maintenance of private pension plans, by providing for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under covered plans, and by maintaining PBGC premiums at the lowest level consistent with its obligations. 29 U.S.C. §1302(a).

All of petitioners' arguments were carefully considered by the district court and court of appeals. They were properly rejected on the basis of the

language of the statute, its legislative history, and the applicable regulations. Such decisions were clearly correct. There is no conflict in the circuits. The question of construing §1301(b) was important for advancing the ultimate termination of this case. That task was well performed below. There is no need for this Court to replough the same ground.

2. For the first 270 days after the enactment of ERISA, PBGC had authority to waive or reduce termination liability where "necessary to avoid unreasonable hardship." 29 U.S.C. §1304(f). The power of the PBGC to grant emergency relief expired on May 30, 1975. Although Avon had earlier been advised by its plan administrator to make a waiver request by the deadline date, it neglected to do so until too late. PBGC, which received the waiver request on June

10, 1975, refused to consider it because it was untimely.

The court of appeals ruled that Avon did have knowledge that PBGC had instituted a waiver-request procedure and that PBGC's authority to grant a waiver had expired before it received Avon's request.

The A-T-O decision cited by petitioners (Pet. 24) has been reversed on appeal. A-T-O v. PBGC, 318 Pens. Rep. (BNA) D-1 (Nov. 24, 1980).

In view of the facts and the terms of the statute, the decision of the court of appeals was manifestly right. Further review is not warranted.

3. Notwithstanding the finding that there was a negligent failure to seek a timely waiver of liability on grounds of unreasonable hardship, petitioners challenge on due process grounds the

retroactive imposition of liability on members of the controlled group. The Court should refuse to consider this constitutional question.

First, the decision below was rendered on an appeal from an interlocutory order. The district court had remanded the case to the bankruptcy court for determination of the net worth of the controlled group and for apportionment of the liability among the members of the Ouimet Group. This has not yet been done. Until net worth has been established and apportionment accomplished, it is not possible to ascertain the impact of controlled group liability upon solvent or insolvent affiliates of the group or upon their creditors. Without a complete factual record depicting such impact, this Court should avoid consideration of the constitutional question as premature.

Second, if retroactivity alone is the issue, then the question is no different for members of a controlled group than it is for unaffiliated businesses. The Court refused to consider that constitutional issue in Nachman Corp. v. Pension Benefit Guaranty Corp., 442 U.S. 940 (1980). Moreover, in resolving the statutory question on Nachman, this Court recognized that ERISA necessarily has a retroactive impact and it quoted with approval the conclusion of the Seventh Circuit Court of Appeals that "Congress had adequately tempered the Act's burdens on employers and that those burdens were sufficiently justified by the public purposes supporting the legislation." U.S. , 100 S. Ct. 1723 (1980).

The court below followed the Seventh Circuit's decision in Nachman, 592 F.2d

947 (7th Cir. 1979). In rejecting petitioner's constitutional challenge, it relied on Usery v. Turner Elkhorn Mining Co., 482 U.S. 1 (1976) upholding the constitutionality of a statute requiring the payment of benefits to miners with black lung disease who had left the industry before the effective date of the act. Acknowledging the act's retroactive effect, the Court in Usery found no lack of due process:

> "But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations...
>
> This is true even though the effect of the legislation is to impose a new duty or liability based on past events..." 482 U.S. 1, 16.

Neither Railroad Retirement Board v. Alton Railroad Co., 295 U.S. 330 (1935) nor Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) is controlling

here. Alton is an outmoded precedent founded on the doctrine of substantive due process. Both Alton and Allied deal with statutes quite different from ERISA. Title IV of ERISA imposes carefully limited termination liability on employers only with respect to employees whose right to a pension had already vested under a pension plan. Moreover, as the Court noted in Nachman, in enacting ERISA Congress "adequately tempered the Act's burdens on employers."

There is no conflict among the circuits on the question of constitutionality. The Third and Sixth Circuits have joined the Seventh Circuit in upholding the constitutionality of employer termination liability under ERISA. In re Williamsport Milk Products Company, Inc. Retirement Plan, 309 Pens. Rep. (BNA) A-16 (3d Cir. Aug. 29, 1980); A-T-O v. PBGC, supra.

Consequently, this Court should decline to review petitioners' claim of unconstitutionality.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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